

12-1-1952

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Clyde W. Summers
University at Buffalo School of Law

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Recommended Citation

Clyde W. Summers, *Judicial Review of Labor Arbitration or Alice through the Looking Glass*, 2 Buff. L. Rev. 1 (1952).

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JUDICIAL REVIEW OF LABOR ARBITRATION

or

ALICE THROUGH THE LOOKING GLASS

CLYDE W. SUMMERS*

"Oh, what fun it is! How I wish I was one of them! I wouldn't mind being a Pawn if only I might join—though of course I should like to be a Queen best."¹

Undaunted by their adventures in the Wonderland of labor disputes, the courts have eagerly entered the Looking Glass World of labor arbitration. Anxious to join in the activities, they have been unaware of their awkwardness and undismayed by their blunders. Like Alice, they have not been entirely content to be pawns, but have longed to be queens in this world quite reversed from their own.

The courts may be asked to join at either of two points in the arbitration process—either before the grievance has been submitted to the arbitrator or after the arbitrator has issued his award. Under the New York ARBITRATION LAW,² if one of the parties refuses to arbitrate, the other may ask the court for an order compelling arbitration, or he may simply give notice of an intent to arbitrate and thereby force the resisting party to move to stay arbitration.³ The only function of the court is to determine whether "a written contract providing for arbitration was made . . . and there was a failure to comply therewith."⁴ If the

*Associate Professor of Law, University of Buffalo.

1. Carroll, ALICE THROUGH THE LOOKING GLASS, (Peter Pauper Press, Mount Vernon, N. Y.) p. 42.

2. C. P. A., Art. 84.

3. C. P. A. §§1450, 1458. Court intervention prior to arbitration may occur in a third manner. If one of the parties brings an action upon an issue referable to arbitration, the supreme court can stay all proceedings in the action until arbitration is had. C. P. A. §1451.

4. C. P. A. §1450.

parties proceed to arbitration but one is dissatisfied with the award he may move to vacate or modify the award, or he may refuse to comply and force the other party to move to confirm.⁵ The award may be vacated "where the arbitrators exceeded their powers",⁶ and may be modified "where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property referred to in the award."⁷ These provisions, while permitting the courts to participate, make the courts appear as mere pawns in enforcing the arbitration agreement of the parties. But pawns can become queens, and courts by intervening at either of these two points may achieve the power to rule over labor arbitration.

Today, arbitration is the accepted method of settling grievances which arise under a collective bargaining agreement. Over 80% of all agreements provide for arbitration as the final step in the grievance procedure. We cannot examine all aspects of judicial participation in labor arbitration, but will deal with what is perhaps the most critical aspect—the intervention by the courts on the merits of the grievance.⁸ This requires first an inquiry into the extent to which courts enforce their own judgment on the merits, second, an articulation of some of the misconceptions which cause the courts to stumble, and third, a suggestion of some of the factors which should be weighed in determining the proper measure of judicial supervision.⁹ Study has been restricted to New York labor arbitration cases under the ARBITRATION LAW. Commercial arbitration is not considered directly, for the extent of court intervention and the problems raised are markedly different.

5. C. P. A. §§1461, 1462, and 1463.

6. C. P. A. §1462. The award may be vacated also for defects in the arbitration procedure as contrasted with failure of the arbitrator to decide the merits correctly. Thus it may be vacated if "procured by corruption, fraud, or undue means", if there was "evident partiality or corruption" in the arbitrator, or if the arbitrator failed to provide an opportunity for a full and fair hearing.

7. C. P. A. §1462-a. The award may be modified also where it is imperfect in form only, or where the arbitrator has made an award on a matter not submitted to him but not affecting the merits of the decision upon matters submitted.

8. For a careful study of the legal basis for arbitration in New York and the enforceability of awards, see Freidin, *Legal Status of Labor Arbitration*, in First Annual Conference on Labor Law, New York University, 1948) 233.

9. For closely related studies directed toward the questions of the jurisdiction of the arbitrator and the arbitrability of the issues, see Clifton, *Arbitration and Arbitrability*, Third Annual Conference on Labor Law (New York University, 1950) 187; Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. OF CHI. L. REV. 616 (1950); Syme, *Arbitrability of Labor Disputes*, 5 RUTGERS L. REV. 455 (1951).

For a study of the non-legal aspects of arbitrability, see 1951 *Report of the Committee on Improvement of Administration of Union-Employer Contracts*, Section of Labor Relation Law, American Bar Association, published in 6 ARB. J. 200 (1951).

JUDICIAL REVIEW OF LABOR ARBITRATION

I.

To the Looking Glass World it was
Alice that said, "I've a sceptre in
hand, I've a crown on my head."¹⁰

The courts repeatedly affirm that they are little more than pawns with no power to examine into the merits of the grievance. Where the courts are asked to intervene prior to arbitration by a motion to compel or a motion to stay arbitration, they have said,

"In proceedings of this character two questions must be determined: (1) Was an agreement to arbitrate made, and (2) has there been a refusal to arbitrate . . . The merits of the controversy will be determined not by the court but by the tribunal designated by the parties in the agreement to arbitrate."¹¹

Where courts have been asked to intervene after the arbitrator has issued his award, they have been equally positive in stating their limited powers.

"The award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it."¹²

The first power which the courts assert is to determine whether there exists between the parties a valid agreement to arbitrate.¹³ This involves questions such as whether the parties made a valid contract, whether it contains an arbitration clause, and whether it has been terminated.¹⁴ If the employer sells his business or the

10. *Supra* n. 1, at p. 181.

11. *Mencher v. B. S. Abeles & Kahn*, 274 App. Div. 585, 590, 84 N. Y. S. 2d 718, 723 (1st Dep't, 1948).

12. *Matter of Motor Haulage and International Brotherhood of Teamsters*, 272 App. Div. 382, 383, 71 N. Y. S. 2d 352, 353 (1st Dep't, 1947).

13. This question is usually raised on an application to compel arbitration or a motion to stay arbitration, although it might possibly be raised on a motion to confirm or vacate if the resisting party has neither participated in the arbitration nor been served with a notice to arbitrate as provided in C. P. A. § 1458. For cases in which the court has held there is an existing contract to arbitrate, see *In re Atlantic Basin Iron Works Inc.*, 59 N. Y. S. 2d 662 (1945); *Barbein v. Superior Meter Co.*, 12 L. A. 614 (N. Y. Sup. Ct. 1949); *In re Heating, Piping & Air Conditioning Contractors*, 12 L. A. 243 (N. Y. Sup. Ct. 1949).

14. *Sanders v. New York Joint Board*, 280 App. Div. 781, 113 N.Y.S. 2d 532 (1st Dep't, 1952); *Video Television Inc. v. District 65*, 18 L. A. 197 (N. Y. Sup. Ct. 1952); *In re U. S. Multigraphing Co.*, 15 L. A. 298 (N. Y. Sup. Ct. 1950). But see *In re Duffy*, 18 L. A. 68 (N. Y. Sup. Ct. 1952), where the court said that the period of time covered by the agreement was for the arbitrator. The fact that the contract has expired does not prevent arbitration of grievance occurring prior to the expiration date. *Dumont Electric Corp v. Cliff*, 17 L. A. 319 (N. Y. Sup. Ct. 1951).

union suffers a schism, there may also be presented the question whether the parties are the same as those who made the agreement.¹⁵ These issues are usually collateral to the merits of the grievance, for they go to the existence of an agreement, not the meaning of its terms. However, in some cases the court's determination of these questions may constitute an adjudication of the grievance on its merits. Thus if an employer closes his business and the union charges that this amounts to a lockout, the court in finding that the employer has dissolved and thereby terminated the agreement actually rules on the merits of the union's claim.¹⁶ Similarly, if the employer refuses to pay over check-off funds or otherwise recognize a local which has seceded from its parent, the court in determining whether the local is a party to the agreement will decide the merits of the dispute.

The courts, however, do not limit themselves to determining whether there is an agreement, but also determines the scope of the agreement. The Belding Heminway Company was a member of a New York City employers association which had made a collective agreement with the union providing for a closed shop. Two months after the agreement was made, the Company opened a new plant in New Jersey but refused to operate under a closed shop, contending that the agreement did not apply to plants outside New York City. The union contended that the plant had been established to avoid the obligations of the agreement and sought to arbitrate the question whether employees in the New Jersey plant who failed to join the union should be discharged. The Court of Appeals held that the arbitration should be stayed because "the scope of the collective bargaining agreement . . . was for the court, not for the arbitrators."¹⁷ The decision rests on the simple

15. *Copenhagen Castle Beer Corp. v. Beer Drivers Local Union*, 17 L. A. 3 (N. Y. Sup. Ct., 1951); *Baziller v. Livingston*, 17 L. A. 117 (N. Y. Sup. Ct., 1951); *Building Service Employees Union v. Pinkerton National Detective Agency*, 16 L. A. 128 (N. Y. Sup. Ct., 1950). However where the employer participated in the arbitration and one of the issues presented was whether the employer's dissolution terminated the contract, the employer was held to have waived his right to claim the arbitrator had no jurisdiction. *Korman v. Dreyer Bros. Home Furnishings*, 16 L. A. 251 (N. Y. Sup. Ct., 1951).

16. See, for example, *In re Kossoff*, 276 App. Div. 621, 96 N. Y. S. 2d 689 (1st Dep't, 1950). The court in such a case need not rule on the merits, for it could reason that dissolution does not terminate the contract prior to its expiration date. *Sanders v. New York Joint Board*, 17 L. A. 762 (N. Y. Sup. Ct., 1952). The court could then leave to the arbitrator the question whether under the agreement the dissolution justifies the employer's layoff of his employees.

17. *Matter of Belding Heminway Co. and Wholesale & Warehouse Workers Union*, 295 N. Y. 541, 68 N. E. 2d 681 (1946). *Accord*, *In re Dumon Electric Corp.*, 14 L. A. 1005 (N. Y. Sup. Ct., 1950); *but see In re Gluckstern's Restaurant*, — A. D. —, 113 N. Y. S. 2d 372 (1st Dep't, 1952).

JUDICIAL REVIEW OF LABOR ARBITRATION

logic that if the New Jersey plant is not within the scope of the agreement, then there is no contract to arbitrate grievances concerning it, and the presence or absence of a contract is for the court to declare.

The simplicity of the logic ought not obscure its full implications. First, the courts in determining the scope must interpret the terms of the agreement, and to this extent preempt the duties of the arbitrator. Second, it gives the court the power in some cases to adjudicate the merits of the grievance. Thus, in the *Belding Heminway* case the court and not the arbitrator determines whether the collective agreement provides the union this protection against runaway shops—the very heart of the grievance. Third, and most important, the logic is equally applicable to problems of scope other than geographical,¹⁸ and few are the grievances which cannot be expressed as problems in the scope of the agreement.

The potential reach of the “scope” doctrine springs from the theory frequently expressed by the courts that management retains full freedom to manage its business except to the extent it has agreed to limit that freedom by the collective agreement. The agreement is a grant of rights to the union, and those not granted are retained by management. Therefore, when the union files a grievance the only question is whether the right claimed by the union is granted by the agreement. If it is not, then it falls outside the “scope” of the agreement. For example, when a union objected to an employer’s compulsory retirement policy and sought arbitration, the court granted the employer’s motion to stay arbitration. The court, after examining the agreement and the negotiation history, found that the employer had not agreed to surrender his power to compel retirement. Therefore the subject

18. Quite similar to the question of what geographical area is covered by the contract is what employees are covered. Thus in *Application of Graphite Metallizing Corp.*, 271 App. Div. 839, 66 N. Y. S. 2d 53 (1946), the court held that the question whether a grievance concerning an employee who had quit 6 months before the contract was made could be arbitrated was a question of scope for the courts.

The courts, however, sometimes refuse to apply this logic. In *Matter of Royal Typewriter Co. Inc.*, 15 L. A. 64 (N. Y. Sup. Ct., 1950), the contract, in defining the bargaining unit, included “servicemen”. After the contract was made the Company began handling electric typewriters, which required special servicemen with entirely different skills. The Company contended that these servicemen were not in the bargaining unit, and sought to stay arbitration of a grievance concerning them. The court refused to determine the scope of the contract but said, “whether the contract covers servicemen working on electric typewriters . . . should be left to the arbitration board.” Similarly, in *Bring Chevrolet Co. v. Amalgamated Union Local 259, U. A. W.-C. I. O.*, 16 L. A. 127 (N. Y. Sup. Ct., 1951), the court held that whether an employee was a supervisor and therefore not covered by the contract was for the arbitrator.

matter of the grievance was not within the "scope" of the agreement.¹⁹

Starting with the narrowly worded power to determine "whether an agreement to arbitrate was made", the courts have implied the power to determine the "scope" of the agreement and thereby created a device which enables them to supplant the arbitrator's function at will. While declaring themselves pawns they hold the power of queens!

The second power asserted by the courts is the limited one of determining the jurisdiction of the arbitrator. Since arbitration is based upon contract, the parties cannot be compelled to arbitrate nor be bound by an award except to the extent they have so agreed.²⁰ Therefore, the arbitrator's powers are confined to those granted by the agreement, and it is the court's function not to pass on the merits of the dispute but merely to keep arbitration within this granted jurisdiction.²¹

To determine the question of jurisdiction the court must look to the arbitration clause in the collective agreement. If the clause is explicit either in granting or denying the arbitrator's power, the court acts only as a pawn in enforcing its clear words. Thus, the contract may expressly provide that increases in work loads

19. *General Electric Co. v. U.E.R. & M.W.A.-C.I.O.*, 196 Misc. 143, 91 N. Y. S. 2d 724 (Sup. Ct. 1949). For a similar case in which the court used the same reasoning to aid it in coming to the same result, see *American Federation of Grain Millers, Local 110, A.F.L. v. Allied Mills, Inc.*, 196 Misc. 517, 91 N.Y.S. 2d 732 (Sup. Ct., 1949). In *Application of Hawley*, 91 N.Y.S. 2d 723 (Sup. Ct., 1942), a grievance concerning holidays and sick pay was held not arbitrable as "without the express scope of the contract."

The impact of these decisions is not lessened by the fact that the court seems to be holding only that the subject matter generally is not covered by the contract. In the *General Electric* case the court said the parties had made no agreement concerning compulsory retirement, completely ignoring the fact that the problem was one of tenure of employment, which was extensively covered by the contract. The court, while using language of "scope" is actually interpreting the seniority and discharge for cause provisions of the agreement.

20. In pre-arbitration proceedings the question for the courts is whether there has been a failure to comply with the arbitration agreement. (C.P.A. § 1450). If the grievance is outside the jurisdiction of the arbitrator there is no duty to submit to arbitration and hence no failure to comply. In post-arbitration proceedings the question is whether the arbitrator in making his award "exceeded his powers", (C.P.A. § 1462) or in other words exceeded his jurisdiction. In either case the court's function of determining jurisdiction remains the same.

21. The courts have almost unanimously held that the arbitrator can not determine his own jurisdiction. To do so would allow him to lift himself by his own bootstraps. Since the courts by determining the arbitrator's jurisdiction also determine their own, there seems to be no equivalent limitation on judicial self-propulsion. See, for example, *Publisher's Ass'n. of N. Y. v. Simons*, 196 Misc. 888, 93 N. Y. S. 2d 782 (Sup. Ct., 1949).

JUDICIAL REVIEW OF LABOR ARBITRATION

shall be the subject of arbitration,²² or that disputes on wage reopenings shall not be subject to arbitration.²³ The court in such cases does not, by determining jurisdiction, reach the merits of the controversy. However, the arbitration clause may cloak substantive rights in terms of jurisdiction. Thus provisions may state that discharges for sub-standard work, or for failure to obtain government clearance to work on classified data shall not be the subject of a grievance or arbitration. Although phrased in terms of jurisdiction such clauses simply define what shall constitute discharge for cause. When the court stays arbitration it determines that the person was discharged for the reason claimed and that such a discharge was justified under the agreement.²⁴

Arbitration clauses, however, are seldom so explicit. Although the precise terms may vary, they fall into two general groups. The most common types restrict the arbitrator to "interpreting and applying the agreement" and frequently includes the redundant warning that the arbitrator "shall not add to, subtract from, or modify the agreement." The second type is more broadly phrased, submitting to the arbitrator "any dispute or grievance arising between the parties." With such clauses the court's task of defining the arbitrator's jurisdiction becomes more complex, but the courts have rewarded themselves handsomely for their extra labors.

In *Western Union Telegraph Company v. American Communications Association*,²⁵ employees who refused to handle telegrams transmitted to Western Union by non-striking employees of other companies on strike were discharged for engaging in a stoppage. The arbitrator ordered reinstatement, holding that in the light of the custom of the trade that employees were not re-

22. *Silcox v. Julliard & Co.*, 15 L. A. 668 (N. Y. Sup. Ct., 1950) (motion to stay denied).

23. For cases involving reopening, see note 26 *infra*.

24. *Berglas v. Shadel*, 75 N. Y. S. 2d 425 (Sup. Ct. 1947) (motion to stay granted); *Sperry Gyroscope Co. v. Engineers Ass'n.*, — App. Div. —, 106 N. Y. S. 2d 597 (1st Dep't, 1951). See also *In re Federation of Metropolitan Architects*, 12 L. A. 852 (N. Y. Sup. Ct., 1949). In *Oppenheim Collins Co. v. Display Union, Local 144, C.I.O.*, 73 N. Y. S. 2d 673 (Sup. Ct., 1947), the employer dismissed window trimmers and assigned their work to other employees for claimed business reasons. The court stayed arbitration because the contract provided that dismissal for business reasons "shall be in the sole discretion of the Employer", and thereby impliedly excluded this grievance from the arbitrator's jurisdiction. This foreclosed the main issue—whether the business reason was bona fide. In *Curry v. Reddich*, 86 N. Y. S. 2d 674 (Sup. Ct., 1949), the court extended this reasoning another step. The union protested the employer's subcontracting the work of one department and laying off employees in that department. The court held that in the absence of any provision against subcontracting, this was within management's inherent prerogatives and therefore excluded from the arbitrator's jurisdiction.

25. 299 N. Y. 177, 86 N. E. 2d 162 (1949).

quired to handle "hot traffic", there had been no "stoppage" within the meaning of that term of the agreement. The Court of Appeals held that the word "stoppage" could not be so interpreted, and included refusal to handle struck work. Since the arbitrator's power was limited to interpreting the agreement, he had exceeded his jurisdiction. The logic is again simple. Since the power to interpret does not include the power to misinterpret, any misinterpretation falls outside the jurisdiction of the arbitrator. The court, to determine whether the arbitrator has stayed within his jurisdiction must, therefore, interpret the agreement. With this bit of magic logic the arbitrator is dethroned and the cane of a pawn becomes the sceptre of a queen.²⁶

Under a more broadly phrased arbitration clause the logic is lengthened, but the result is the same. Since the arbitration clause is an integral part of the collective agreement and the parties do not intend that the arbitrator shall have the power to remake their agreement, he must keep within the framework of the agreement and be governed by its provisions. The terms of the agreement again become the limits of the arbitrator's jurisdiction, and the court under the cloak of jurisdiction interprets the agreement. Thus in *Application of Berger*,²⁷ the union protested the lay-off of a whole department due to sub-contracting by the employer and sought arbitration. The court interpreted the discharge, seniority, and management prerogative clauses of the agreement and found no provision prohibiting this layoff. It therefore refused to compel arbitration in spite of the clause that "any grievances or disputes" were subject to arbitration.

26. Defining the jurisdiction of the arbitrator does not always adjudicate the merits of the principal dispute. Thus determining that a dispute on wage reopening is arbitrable does not settle the wage issue, but leaves the merits to the arbitrator. However, the courts are reluctant to grant the arbitrator this power unless the contract explicitly provides for arbitration of this issue. *Towns and James v. Barasch*, 197 Misc. 1022, 96 N. Y. S. 2d 32 (Sup. Ct., 1950); *McCarten v. Brooklyn Bridge Freezing & Cold Storage Co.*, 81 N. Y. S. 2d 494 (Sup. Ct., 1948); *Vasck v. Mathews*, 79 N. Y. S. 2d 5 (Sup. Ct., 1947); *Application of Berger*, 191 Misc. 870, 79 N. Y. S. 2d 940 (Sup. Ct., 1948). Even though arbitration is explicitly provided it will be narrowly construed. *Publishers Ass'n of N. Y. v. Simons*, *supra* n. 21, ("revision of basic wage rates" held not to include health and welfare benefits).

Similarly determining the arbitrator's jurisdiction to reduce a discipline penalty does not adjudicate the merits directly, although it may leave the union remediless and in effect uphold the employer's decision. Again the courts seem chary about giving the arbitrator this power unless it is expressly granted. In *re American Safety Razor Corp.*, 280 App. Div. 800, 113 N. Y. S. 2d 232 (3rd Dep't 1951); In *re Silber*, 13 L. A. 733 (N. Y. Sup. Ct., 1949); *Modernage Furniture Co. v. Weitz*, 64 N. Y. S. 2d 467 (Sup. Ct., 1946); *Atlantic Basin Iron Works v. Independent Union of Marine and Shipbuilding Workers*, 59 N. Y. S. 2d 660 (Sup. Ct., 1945).

27. 191 Misc. 1043, 78 N. Y. S. 2d 528 (Sup. Ct., 1948). For a similar, if not more extreme case of judicial interpretation of the contract, see *Twentieth Century-Fox Film Corp. v. Screen Publicists Guild*, 78 N. Y. S. 2d 178 (Sup. Ct., 1948).

JUDICIAL REVIEW OF LABOR ARBITRATION

The courts' indifference to the wording of the arbitration clause is suggested by an examination of approximately 100 cases involving the extent of the arbitrator's power. In nearly two-thirds of those cases the court did not even mention the arbitration clause, nor was the arbitrator's power upheld any more frequently under broad than under narrow clauses. Regardless of the wording of the clause, the arbitrator's jurisdiction will almost always be limited to interpreting and applying the terms of the agreement. Only in exceptional cases where the intent of the parties is extremely clear will the court allow the arbitrator to go beyond the terms of the agreement.²⁸

This does not mean that the courts uniformly usurp the power of arbitrators to interpret the agreement. In a number of cases the courts have recognized that there may be more than one reasonable interpretation of a disputed provision,²⁹ and have occasionally given more than lip service to the proposition that arbitrators have the power to make mistakes.³⁰ However, these cases in labor arbitration are distinctly in the minority. Their presence should not obscure the fact that the power to determine the jurisdiction of the arbitrator is the power to supplant him in interpreting the agreement. Any limitations on this power spring less from logic than from self-restraint.

Even simpler and surer than the logic of "scope" and "jurisdiction" is the magic phrase "nothing to arbitrate." The courts will not compel arbitration unless there is a dispute, but if the meaning of the contract is clear and free from doubt there is no dispute, and therefore nothing to arbitrate.³¹ This rule roots in

28. *Plymouth Rock Transportation Corp. v. O'Rourke*, 114 N. Y. S. 2d 160 (Sup. Ct., 1951) (special submission to settle strike); *Samet v. Rutledge Dry Cleaning Corp.*, 15 L. A. 671 (N. Y. Sup. Ct., 1950) (rate subject to arbitration under comprehensive agreement); *Association of Master Painters v. Brotherhood of Painters*, 64 N. Y. S. 2d 405 (Sup. Ct., 1946) (fixing of overtime hours expressly granted to arbitration board). However, in *In re Simons*, 13 L. A. 482 (N. Y. Sup. Ct., 1949) the court vacated an award of the arbitration board which revised the seniority structure even though the revision was necessary to avoid unfair labor practice charges and both union and management representatives were members of the board and helped work out the new seniority system.

29. *In re New York World Telegram Corp.*, 17 L. A. 406 (N. Y. Sup. Ct., 1951); *North American Phillips Co. Inc. v. I. A. M.*, 16 L. A. 275 (N. Y. Sup. Ct., 1951); *Local 74, National Food Chain Store Employees v. Safeway Stores*, 79 N. Y. S. 2d 493 (Sup. Ct., 1948).

30. *Matter of Motor Haulage*, *supra* n. 12; *Allen v. Jayne*, 279 A. D. 444, 110 N. Y. S. 2d 609 (1st Dep't, 1952); *In re Ponton Inc.*, 102 N. Y. S. 2d 445 (Sup. Ct., 1950); *Application of Davis*, 57 N. Y. S. 2d 387 (Sup. Ct., 1945).

31. If there is nothing to arbitrate there can, of course, be no agreement to arbitrate and "failure to comply therewith" under C.P.A. § 1450. Therefore, the court will not compel but will stay arbitration.

*International Association of Machinists v. Cutler Hammer Inc.*³² itself a revealing case. The collective agreement provided for a 6% bonus for the last six months of 1945 and then stated, "The Company agrees to meet with the union early in July 1946 to discuss payment of a bonus for the first six months of 1946." The Company did meet with the union, but refused to pay any bonus for 1946. The union claimed that the contract contemplated that some bonus would be paid but left open the amount. Judge Sheintag, then on the Supreme Court, granted the union an order compelling arbitration. The Appellate Division, by a divided court, reversed, stating:

"The mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words can not make an arbitrable issue. It is for the court to determine whether the contract contains a provision for arbitration of the dispute tendered and in the exercise of that jurisdiction the court must decide whether there is such a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."³³

The court then found that the contract was "so clear" and the union's claim "so untenable" that there was no dispute and nothing to arbitrate. The Court of Appeals, with two judges dissenting, affirmed.³⁴ In spite of the dispute between the judges, the meaning of the clause was "beyond dispute"!

This rule plunges the courts directly into contract interpretation, the very heart of arbitration. The courts have not restricted themselves to determining whether the claim was so patently frivolous or unconscionable that the bringing of it was in bad faith and an abuse of the arbitration process.³⁵ On the con-

32. 297 N. Y. 519, 74 N. E. 2d 464 (1947).

33. 271 App. Div. 917, 918, 67 N. Y. S. 2d 317, 318 (1st Dept., 1947).

34. The majority affirmed without opinion: Judge Fuld, dissenting with Judge Desmond, said (page 520):

"A claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration, but I do not so regard the claim here asserted . . . It may well be argued, and in good faith, that in the light of surrounding circumstances and of experience in the industry, and indeed in this very business, respondent company agreed that a bonus would be paid. If there is a possibility of such construction, the court should not remove the controversy from the sphere of arbitration, particularly when the applicable arbitration clause is so broad . . . In short, I think there is something to arbitrate."

35. Frivolous cases may be pushed to arbitration occasionally for any number of reasons. A few reported cases seem to be of that type, although the report is frequently sketchy and must always be recognized as a self-serving statement by the court. See for example, *In re Ryerson*, 17 L. A. 319 (N. Y. Sup. Ct., 1951); *Matter of Straus Stores Corp.*, 189 Misc. 428, 71 N. Y. S. 2d 315 (Sup. Ct., 1947). For a suspicious looking case, see *Dumont Electric Corp. v. Cliff*, 17 L. A. 319 (1951).

JUDICIAL REVIEW OF LABOR ARBITRATION

trary they have spun fine lines of reasoning to prove ostensibly ambiguous clauses unambiguous,³⁶ delved into obscure and equivocal negotiation history to discover the indisputable intent of the parties,³⁷ and ingeniously manipulated overlapping and conflicting clauses to resolve all doubts.³⁸ Far more clear than the meaning of the agreement is the fact that the court is engaged in doing the very job of interpretation assigned to the arbitrator. After doing the arbitrator's job, they declare there is "nothing to arbitrate".

The court can use this "nothing to arbitrate" rule only to deny the claim of one seeking arbitration, for if the court finds the grievance meritorious, it cannot grant an award but can only order arbitration. However, the court is not left powerless, for in ordering arbitration it can easily indicate its interpretation of the agreement.³⁹ Quixotic would be the arbitrator who dared ignore the hint! His award would be short-lived—a victim of the *Western Union* rule that a clearly erroneous interpretation is without jurisdiction, and therefore void.

The only limitation on the courts in finding there is no dispute is their own humility. An agreement is ambiguous only so long as the judge can admit that his own interpretation is disputable. The very existence of the rule that courts will not compel arbitration of a clause that is clear, inevitably draws them into the interpretation process. Once involved, they reach conclusions as to the meaning of the agreement and become persuaded of their rightness. To then find a dispute present is to admit the likelihood of their own error. This is more than most courts can do.

36. See, for example, *Matter of General Electric Co. and U.E.R. & M.W.A.-C.I.O.*, 300 N. Y. 262, 90 N. E. 2d 181 (1949); *American Federation of Grain Millers, Local 360 v. International Milling Co.*, 13 L. A. 755 (1949); *Application of Sohmer & Co.*, 89 N. Y. S. 2d 214 (1949); *Publishers Ass'n of N. Y. v. Simons*, *supra*, n. 21.

37. See, e. g., *American Federation of Grain Millers, Local 110, A.F.L. v. Allied Mills Inc.*, *supra* n. 19; *General Electric Co. v. U.E.R. & M.W.A.-C.I.O.*, (1949) *supra* n. 19.

38. See, e. g., *Twentieth Century-Fox Film Corp. v. Screen Publicists Guild Local No. 114*, 78 N. Y. S. 2d 178 (Sup. Ct., 1948). *Application of Berger*, 191 Misc. 1043, 78 N. Y. S. 2d 528 (Sup. Ct., 1948); *In re Western Union Telegraph Co.*, 16 L. A. 721 (1951).

In some cases the court stayed arbitration of the union's grievance after examining the whole contract and finding nothing curtailing the freedom of management. *Bohlinger v. National Cash Register Co.*, — App. Div. —, 113 N. Y. S. 2d 46 (1st Dept., 1952); *Carborundum Co. v. Wagner*, 198 Misc. 24, 96 N. Y. S. 2d 278 (Sup. Ct., 1950).

39. See, e. g., *In re 150 William Street Corp.*, 15 L. A. 461 (N. Y. Sup. Ct., 1950); *Silcox v. Julliard & Co.*, *supra* n. 22.

One further basis for judicial intervention needs to be mentioned. The courts will not allow the arbitration process to be used to enforce agreements which are either illegal or contrary to public policy. Thus, the Court of Appeals struck down an award based upon an interpretation of the agreement which permitted stoppages violating the penal laws.⁴⁰ Applying the same principle, a lower court refused to compel arbitration where the union's claim was based on a union security provision which the court found violated the NATIONAL LABOR RELATIONS ACT.⁴¹ The soundness of the rule ought not obscure the fact that when the court stays arbitration, as contrasted with when it vacates an award, it must first interpret the agreement, for the legality of the provision depends upon its meaning. This again plunges the courts into the intricacies of contract construction, the special responsibility of the arbitrator.⁴²

The courts' power to supervise labor arbitration rests on narrow grants in the ARBITRATION LAW. These grants, on their face, bar the courts from deciding the merits of the grievance, and the courts repeatedly assert that they cannot prevent or correct "errors of judgment as to law or to fact." The courts' limited power is to keep the arbitration process within the boundaries prescribed by the parties; to protect the parties from arbitration to which they have not agreed. This logically requires them to determine the scope of the contract, the jurisdiction of the arbitrator, and the existence of a dispute. Each of these, in turn, becomes a device for extensive judicial control. The scope of the contract is redefined as the rights granted by the contract; the jurisdiction of the arbitrator includes only the correct interpretation of the agreement; and clauses ambiguous to the parties be-

40. *Western Union Telegraph Co. v. American Communications Association*, *supra* n. 25. For a precursor of this rule, see *Busch Jewelry Co. v. United Retail Employees Union, Local 830*, 170 Misc. 482, 10 N. Y. S. 2d 519 (Sup. Ct., 1939).

In a recent case the court extended this principle to strike down an award of a \$5,000 penalty for a strike in breach of contract. The court held that penalty damages for breach of contract were contrary to public policy and vacated this portion of the award. *Publishers Ass'n of New York City v. Newspaper and Mail Deliverers Union*, 285 App. Div. 500 (1st Dep't, 1952), noted BUFFALO LAW REVIEW, this issue, p. 157.

41. *Matter of Levinsohn Corp.*, 273 App. Div. 469, 78 N. Y. S. 2d 171 (1st Dep't, 1948); *Accord, Barker v. Barile*, 25 L.R.R.M. 2527 (N. Y. Sup. Ct., 1950). The court assumes without discussing that it is empowered in such a proceeding to interpret the NATIONAL LABOR RELATIONS ACT and to aid in its enforcement.

42. See, e. g., *Application of Baker*, 85 N. Y. S. 2d 193 (Sup. Ct., 1948); *Application of Feller*, 82 N. Y. S. 2d 852 (Sup. Ct., 1948). In both cases the court ordered arbitration but only after elaborately construing the health and welfare clauses to find them not in conflict with the Taft-Hartley Act. In both cases the court seemed more intent on making the contract provisions fit the statute than determining the meaning intended by the parties.

JUDICIAL REVIEW OF LABOR ARBITRATION

come indisputably clear to the judge. Thus the courts can interpret the contract, determine the merits, leaving to the arbitrator only his honorary title. By staying arbitration the courts can even deprive the arbitrator of his right to first guess.

The courts have not been reluctant to use the power thus made available. Nearly 100 reported cases have been found in New York in which the courts have been asked to review the substantive issues of grievances under union-management agreements containing arbitration clauses. In nearly 60% of these cases the courts have used one or more of the devices discussed above to decide either directly or indirectly the merits of the grievance, and in 40 of these cases the courts refused even to allow the case to go to arbitration. In only 16 cases did the courts confirm and enforce the award of the arbitrator,⁴³ and not all of these against their better judgment on the merits.⁴⁴

"And what is this on my head?" she exclaimed in a tone of dismay . . . "But how can it have gotten there without my knowing it?" she said to herself as she took it off and set it on her lap to make out what it could possibly be.

It was a golden crown.⁴⁵

II.

"And, how exactly like an egg he is!" she said aloud, standing with her hands ready to catch him, for she was every moment expecting him to fall. "Its very provoking," said Humpty Dumpty, "to be called an egg—very!" "I said you looked like an egg, Sir," Alice gently explained, "and some eggs are very pretty, you know," she added, hoping to turn her remark into sort of a compliment. "Some people," said Humpty Dumpty, "have no more sense than a baby!"⁴⁶

In the Looking Glass World of labor arbitration the courts, like Alice, are deceived by appearances. They are never quite able to resist using names appropriate only for the world of their

43. In 25 other cases the court refused to stay arbitration. This does not necessarily mean that the decision of the arbitrator will be upheld, for the court could still vacate the award. However, no reported cases of this type have been found.

44. In a number of cases the courts while confirming the award have reviewed the merits and indicated their agreement with the arbitrator's award. See, *e. g.*, *In re United Pencil Workers Local Industrial Union*, No. 934 C. I. O., 16 L. A. 179 (N. Y. Sup. Ct., 1951).

45. *Supra* n. 1, page 165.

46. *Id.* at 105.

own. The collective agreement looks so much like an ordinary contract that by calling it such the courts feel safely at home. But the two are quite different, and the failure to see this has led to much trouble.⁴⁷

First, the collective agreement differs from the common contract in the complexity of the relationship which it concerns. The ordinary contract deals with only a single transaction or a small segment of business activity and involves terms which can be defined and fixed. In contrast, the employment relationship in modern industry involves a multitude of terms sometimes covering thousands of employees doing hundreds of different jobs and receiving dozens of different rates of pay. This complexity is multiplied by constant changes in the number of men working, the processes used, and the products produced. While the relationship is complex, the collective agreement must be simple, for it should be distributed to and used by every employee that it governs. Furthermore, the collective agreement does not, like a contract, create the relationship which it governs. Instead it is superimposed upon an existing pattern and operates within the employer's framework of industrial organization and established practices. Its provisions can deal only with the most troublesome parts but may assume a continuation of many procedures and practices left untouched by the agreement.

The collective agreement is designed to meet the special needs presented. In contrast to the common contract, it does not pretend to state all of the terms between the parties with precision, hardness, or completeness. Many details are omitted, and flexibility may be left to permit needed change. The collective agreement includes many broad rules and standards which serve but as guides to the parties in working out day by day their total relationship. The lack of definiteness and completeness is made up by the creation of the grievance procedure through which the parties can continue their process of bargaining.

Second, a collective agreement differs from the common contract in that it deals with an essentially compulsory relationship. In ordinary contracts the parties are free to contract or not as they please, and usually have a choice with whom they deal. But the union and management do not have this same freedom of choice. They are inextricably wedded to each other, are compelled by law

47. For an intensive and instructive study of the special characteristics of collective agreements and the need for special legal handling of problems arising out of them, see Chamberlain, *Collective Bargaining And The Concept of Contracts*, 48 COL. L. REV. 829 (1948).

JUDICIAL REVIEW OF LABOR ARBITRATION

to deal with each other, and are driven by necessity ultimately to agree. Delay in agreement is costly, and the goal sought by both is a period of peace. Thus the parties' desire to avoid or end a strike may far outweigh some of the lesser demands, but out-right surrender by either may be psychologically or politically impossible. Because of this, once the major issues are settled an agreement is frequently written which leaves minor disputes undecided. Gaps are intentionally left, and clear commitments avoided. Negotiations cannot deal with all potential problems, the effects of provisions cannot all be foreseen, and many vague understandings cannot be expressed in writing. The agreement when signed leaves much yet unsettled, for peace cannot wait while small points are quibbled. On these the parties may simply agree to agree. They thus postpone minor issues to be settled in the future by the peaceful procedures prescribed in the agreement.⁴⁸

This compulsion reaches the whole of the relationship between the parties, for they must live together or not at all. When the strike is ended, the entire employment relationship is resumed. Therefore, the settlement must either expressly or impliedly reach every aspect of that relationship. The written document may contain few express provisions but the agreement must inevitably determine the extent to which each party is bound and the extent to which each remains free to use its economic strength. The absence of provisions implies either a silent assumption of duties or a retention of freedom to act. No matter how unclear, it inevitably speaks.

By calling a collective agreement a contract the courts have glossed over its complex and compulsory character. As a result they have frequently lost sight of the function of labor arbitration and have often been deaf to its special demands.

In holding that certain subject matter is beyond the scope of the contract because it is not explicitly mentioned, the courts bar arbitration to determine what the parties have impliedly agreed. The fact that the written document contains no provisions concerning paid holidays and sick pay does not mean that these issues have not been reached by the settlement. The silence may speak of an intent to agree that management retains its discretion, or per-

48. As George W. Taylor has said, "An important key to understanding grievance arbitration is to realize that while collective bargaining starts with the negotiation of an agreement, it necessarily continues in the settlement of many grievances . . . Grievance settling by its nature fills out the understandings expressed in the contract which are inherently incomplete." *The Voluntary Arbitration of Labor Disputes in Law and Labor Management Relations* (University of Michigan, 1950) p. 198-9.

haps of an intent that established customs continue.⁴⁹ But the intent drawn from silence is a part of the agreement, and the arbitrator's function is to determine its meaning whether implied from silence or explicit provisions. By staying arbitration the courts prevent the arbitrator from fulfilling his function. By finding that the subject is beyond the scope of the contract they hold that management still retains its discretion without facing squarely the critical question whether this was the result intended by the parties.

Likewise the courts may determine that certain disputes are beyond the arbitrator's jurisdiction without being aware of the impact of this on the relationship of the parties. In *Towns & James v. Barasch*,⁵⁰ the union sought to arbitrate a wage reopening dispute. Although the agreement provided a broad arbitration clause and the parties had previously arbitrated this matter, the court held that wage reopenings were beyond the arbitrator's jurisdiction. It cited as authority prior decisions involving other parties under differently worded agreements.⁵¹ It seemed utterly unaware that denial of arbitration meant that either the union was rendered helpless by a no-strike clause, or that the dispute could be settled only by a strike which would break the peace established by the agreement. The parties may have intended neither of these alternatives, but may have prized an extended period of peace with a method available to make needed adjustments.⁵² This cannot be determined by using expletives of "no jurisdiction" or by citing judicial precedents. It is simply a question of how the two parties involved intended this future dispute should be settled. The fact that the arbitrator must add new terms or change old ones should be no insuperable obstacle, for he is but the final step in the grievance procedure which is created by the parties for the very purpose of completing and adapting the skeletal terms of

49. In *Application of Hawley*, *supra* n. 19, the court held that "in view of the particularized and detailed nature of the contract" holiday pay and sick leave were not arbitrable. Although phrased in terms of "outside the express scope of the contract" the decision was obviously that the parties had agreed that management retained full discretion on this matter, and therefore the grievance was without merit. For similar cases involving compulsory retirement, see *General Electric Co. v. U.E.R. & M.W.A.-C.I.O.*, *supra* n. 19; and *American Federation of Grain Millers, Local 110 A.F.L. v. Allied Mills Inc.*, *supra* n. 19.

50. 197 Misc. 1022, 96 N. Y. S. 2d 32 (Sup. Ct., 1950).

51. Without any serious inquiry into the intent of the parties, the courts in New York have developed a body of precedent which states as a rule of law that wage reopenings are not arbitrable unless clearly stated in the agreement. See the cases cited in note 26 *supra*.

52. See, e. g., *In re Dumas*, 12 L. A. 243 (N. Y. Sup. Ct., 1949) where parties expressly provided for arbitration of reopening of wages, hours, and working conditions, thus making clear a high preference for peace.

JUDICIAL REVIEW OF LABOR ARBITRATION

the agreement. If the arbitrator has no jurisdiction, the only other resort is a strike. Such an intent is not to be lightly inferred.

In interpreting the terms of the collective agreement the courts have been equally obsessed with concepts appropriate only to common contracts in which terms are stated with directness and precision. In one case the union sought to arbitrate a discharge under a clause which made "any dispute . . . as to any matter" subject to arbitration. The court stayed arbitration on the grounds that nothing in the agreement expressly limited the employer's power of discharge. Therefore there was no violation of any obligation and nothing to arbitrate.⁵³ In another case the union protested the refusal of the employer to continue granting sick leave as he had in the past. The court again stayed arbitration because no sick leave provision was included in the agreement.⁵⁴ In both of these cases, the court barred arbitration and thereby held that the employer is bound only by what is explicitly written—a requirement that is unreal for collective agreements. In a discharge case the arbitrator found the employee "not without fault" but ordered the penalty reduced to reinstatement with partial back pay. The court held that the arbitrator exceeded his powers because he "compromised the controversy."⁵⁵ In another discharge case the arbitrator found only one out of ten counts charged against the employee well-founded and ordered reinstatement without back pay. The court again vacated the award. Since the arbitrator found the employee guilty, he must enforce the discharge!⁵⁶ This approach is more fitting for determining breaches of contract than for the process of adjusting disputes between parties to a collective agreement.⁵⁷

The collective agreement differs as much from the common contract as Humpty Dumpty differs from a common egg. The

53. *Bohlinger v. National Cash Register Co.*, *supra* n. 38. This case is not alone but represents a group of cases in which the court gave the employer an almost entirely free hand because no provision explicitly restricted the specific exercise of discretion. See, for example the cases cited in notes 19, 24, and 38 *supra*.

54. *Application of Towns & James*, 183 Misc. 181, 48 N. Y. S. 2d 81 (Sup. Ct., 1944).

55. *In re Silber*, *supra* n. 26.

56. *Modernage Furniture Co. v. Weitz*, *supra* n. 26. *Accord*, *In re American Safety Razor Corp.*, *supra* n. 26. A far more realistic attitude is illustrated by *Atlantic Basin Iron Works v. Industrial Union of Marine & Shipbuilding Workers*, *supra*, n. 26. There the court held the arbitrator could determine not only the guilt of the employee but the reasonableness of the penalty, as the severity of the penalty could also be a "dispute or controversy" within the arbitration clause.

57. For a discussion of the dangers of these decisions see Gray, *Nature and Scope of Arbitration and Arbitration Clauses*, in *First Annual Conference on Labor Law* (New York University, 1948) p. 211.

failure of the courts to see and remember the differences causes confusion and leads them to blunder. They misconceive the relationship, hobble arbitration, and misinterpret the agreement, and defeat the intent of the parties—all because they forget they are in a world quite unlike their own.⁵⁸

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected. "When I use a word," Humpty Dumpty said in a rather scornful tone, "It means just what I choose it to mean,—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."⁵⁹

The courts' insistence that a collective agreement is "exactly like" a contract is matched by their insistence that common words must have common meanings. Like Alice, they object when familiar words are used in strange ways, forgetting that in this Looking Glass World the parties make words mean just what they choose them to mean, neither more nor less. For example, in the *Western Union* case the agreement provided that there should be no "stoppages".⁶⁰ The arbitrator found that because of a custom of the trade that employees could refuse to handle struck work, the refusal in this case to handle messages coming from struck lines was no "stoppage" within the meaning of the agreement. The Court of Appeals, however, was certain that "stoppage" must mean stoppage, and the parties could not make it mean something else,—"the language is unambiguous, the words plain and clear, conveying a distinct idea."⁶¹ The parties would not even be allowed to explain or prove what they meant, for they

58. For a vigorous denunciation of what the author means "judicial meddling", see Mayer, *Judicial Bulls in the Delicate China Shop of Labor Arbitration*, 2 LABOR L. J. 503 (1951).

59. *Supra* n. 1, at p. 114.

60. *Supra*, n. 25. Criticized 63 HARV. L. REV. 347 (1949).

61. The arbitrator's lot is not an easy one. In *Matter of Universal Metal Products Co.*, 179 Misc. 1044, 40 N. Y. S. 2d 265 (Sup. Ct., 1943), the arbitrator refused to receive evidence as to the intent of the parties because he felt that the provision was clear on its face. This, said the court, was improper and vacated the award.

In direct contrast to the *Western Union* case is *Matter of Motor Haulage*, *supra* n. 12. The contract provided that "No strikes, or lockouts or walkouts shall be ordered or enforced by either party." A walkout occurred. The arbitrator did not find that the union "ordered" it or "enforced" it in the ordinary sense. He held, however, that since large numbers participated with knowledge of the union, the union should be held responsible. This was within the meaning of "ordered or enforced" as used by the parties. The Appellate Division held that this award should be enforced in spite of the arbitrator's interpretation of these words.

JUDICIAL REVIEW OF LABOR ARBITRATION

could not be masters of their own words.⁶² In *Matter of General Electric Company*⁶³ the Court of Appeals was even more self-certain. The collective agreement prohibited discrimination for union activity. It also provided that all time spent by union stewards in settling grievances beyond eight hours a week should be paid for by the union. The Company instituted a pension plan but refused to allow pension credits to stewards for this extra grievance time. The union claimed this prevented stewards from earning full pension rights and therefore constituted discrimination because of union activity. The Court found there was "no real ground of claim" and stayed arbitration. There could be no "discrimination," for pension credits were given to all employees alike on the basis of compensation paid by the Company. "Discrimination" meant mathematically unequal. The parties could not possibly have included in the term "discrimination" a practice which indirectly deprived stewards of equal benefits and thereby discouraged union members from taking that office. The underlying purpose of the provision nor the possible intent of the parties could not change the meaning of the word!⁶⁴

The courts assume in these cases that words are neat packages, each containing a fixed and identifiable meaning, and that the courts need no help in reading the labels. Unfortunately, the words in collective agreements are not so easily wrapped and tied. Every industry has a dialect of its own, and though common words are used they may carry uncommon meanings which differ from industry to industry. The differences may not be bold, but they are no less important, and are often more dangerous because of their subtleness. Each collective agreement is written in the peculiar dialect of the parties, and each word bears the reflected colorations of the industry and the unspoken understandings of the parties, for the usefulness of the agreement depends upon the accuracy with which it expresses their common consent

62. Frequently the court is so certain that the words could mean only one thing that it stays arbitration, thereby preventing a full inquiry into their potential ambiguity. See, e. g., *Publishers Ass'n. of N. Y. v. Simons*, 196 Misc. 888, 93 N. Y. S. 2d 782 (Sup. Ct., 1949) (reopening for "revision for basic wage rates" could not include a union demand for an increase for the purpose of giving its members pension and welfare benefits); *In re General Electric Co.*, 16 L. A. 719 (N.Y.S. Ct., 1951) ("absence" for purposes of computing service credits must include refusal to work during lawful strike).

63. 300 N. Y. 262, 90 N. E. 2d 181 (1949).

64. In a number of cases the courts have stayed arbitration because provisions seemed clear on their face although closer scrutiny of their purpose and the intent of the parties might have raised substantial doubts whether their meaning was so precise or certain. See, e. g., *Application of Sohmer & Co.*, *supra* n. 36; *American Federation of Grain Millers, Local 360 v. International Milling Co.*, *supra* n. 36; *Dumont Electric Corp. v. Cliff*, *supra* n. 14.

in the language which they most readily understand. To impose on the words thus written by the parties the meanings known by the court is to rewrite the agreement and defeat the intent of the parties. The cases bear witness to the dangers involved.

This Alice-like attitude that words speak simply and singly not only distorts the agreement but can destroy arbitration itself. It provides the unspoken premise which is used to extend "scope" and "jurisdiction" to complete judicial control of the merits. The rationale of those doctrines is that the parties are bound by arbitration only to the extent to which they have so agreed, and that the courts are to protect them from arbitration beyond these limits. The parties have consented to arbitration only within the terms of the collective agreement. Therefore, the court must determine the meaning of the collective agreement to discover the arbitrator's power. Tucked away out of sight is the premise that words are simple, that clauses and provisions have single meanings, and that there can be discovered *the* meaning of the agreement. This premise, of course, flies in the face of the whole structure of a collective agreement which by its skeletal nature, its incomplete negotiation, and its deliberate ambiguity is not intended to have an indisputable meaning. The urgency for labor arbitration, apart from settling purely factual disputes, arises from a sharp awareness of the parties that their words might have multiple meanings.

Underlying the whole process of judicial review of labor arbitration lies two major misconceptions which permeate a major portion of the court decisions. One is the misconception that a collective agreement is a common contract and the other is the misconception that the words and provisions in collective agreements must carry common and fixed meanings. Both of these spring from the courts' apparent inability to recognize the strangeness of this world, and both result in an assumption of authority which is exercised with extreme awkwardness.

III.

"Contrariwise," continued Tweedledee, "if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic."⁶⁵

The previous sections have described the extent to which the courts have exerted their control over labor arbitration, and have pointed out some of the delusions which have caused the courts to blunder in reviewing arbitration cases. These, however, do not reach the critical question—the extent to which the courts should supervise labor arbitration. This question is seldom faced by the

65. *Supra* n. 1 at p. 67.

JUDICIAL REVIEW OF LABOR ARBITRATION

courts directly, although it is implicit in every decision. When faced, the answers are spelled out by careful deduction from unquestioned premises. The courts declare that their function is to enforce contracts to arbitrate. Therefore, they must determine whether there is a contract to arbitrate and what powers are granted to the arbitrator. All of the rest logically follows,—determination of “scope”, “jurisdiction”, or “arbitrability”. However, such logic does not justify what the courts do, for it is based upon a self-serving syllogism. The premise is merely the conclusion stated in a more obscure form and the simplicity of the words only conceals the smuggled assumptions. Nor can the answers ever be provided by the logic of Tweedledee, for the problem is not one of semantics but of practical need.

Labor arbitration is a part of the process of collective bargaining; a procedure for administering an agreement and adjusting disputes between the parties. The question is the practical one of the role which the courts should play in that procedure to make it serve more adequately the needs of the parties.

The difficulty of the question springs from the fact that labor arbitration itself rests upon a basic inconsistency. On the one hand both union and management prize their freedom to bargain. They demand the right to make their own agreement, and once made they insist that no one shall change it. The strength of this feeling is evidenced by the infrequency with which the parties will arbitrate the making of an agreement and the nearly unanimous objection of both parties to what is commonly known as compulsory arbitration. Because of this deep-rooted attitude, the parties usually insist that grievance arbitration be confined to “interpretation and application” of the agreement. On the other hand, one of the main reasons for arbitration is the failure of the parties to make a completed agreement. No attempt is made to provide explicitly for every potential dispute. On the contrary, gaps may be intentionally left, ambiguous phrases deliberately used, and minor problems left undiscussed. The agreement is signed with both parties knowing full well that many problems remain to be settled through the grievance procedure and by arbitration if necessary. Thus, arbitration becomes the means for completing the agreement. The parties themselves seldom see clearly the inconsistency of demands which they make on the arbitration process and it is this which the courts must discover.

The courts, in supervising labor arbitration, are faced with the dilemma posed by these conflicting desires of the parties. If the courts do not hold a check rein on arbitrators, the parties may be fearful that their agreement will be remade and therefore hesitate to use the arbitration process. But if the courts hold the reins

too tightly, the arbitrator loses flexibility and his usefulness is greatly decreased. No magic words or simple rules can resolve this dilemma, for the court must balance the conflicting desires of the parties. Underneath lies the vague and inarticulate understanding of the parties as to the role which the arbitrator should play in working out their relationship. The courts must attempt in each case to discover this intent, for the function of the court is simply to fulfill in each case this expectation of the parties.

Obviously, the closeness of judicial control must vary widely from agreement to agreement, for the relative strength of the conflicting desires are seldom the same. Every arbitrator knows that the parties under one agreement may want him only to construe the explicit words of a provision, while other parties under another agreement may want him to work out a solution based on the total relationship. The role of the impartial chairman in a branch of the garment industry may be far different from the role of a permanent umpire in the steel industry. Likewise, the function of an arbitrator may change as the relationship of the parties matures. The words of the arbitration clause may furnish some clue, but they are seldom clear and are never divorced from the context of the entire relationship. The readiness of the court to intervene must depend on these many subtle factors.⁶⁶

Judicial review of labor arbitration consists of the court substituting its decision for that of the arbitrator. The roles of the court and the arbitrator are complementary, for the power of the arbitrator fixes the helplessness of the court, and the control of the court fixes the subservience of the arbitrator. Therefore, in determining the extent to which the court should supervise arbitration it is necessary to compare the qualifications of courts and arbitrators to make these decisions. Little should need be said on this point, but the failure of the courts to recognize their limitations requires some reminders.

Most obvious, the courts are often unfamiliar with the whole background of industrial processes and practices against which the words of the collective agreement must be cast. They have difficulty understanding the language of the parties, and too often fail

66. The total failure of the courts to understand the problem is most clearly revealed by their practice of determining the power of the arbitrator by searching out prior judicial decisions which involved other parties operating under different agreements. Thus in *Towns & James v. Barasch*, *supra* n. 50, the court stayed arbitration of a wage reopening on the authority of the *Berger* case, *supra* n. 26. This decision in turn had been based on the *Cutler Hammer* case, *supra* n. 32. The court did not give even a second thought to the possibility that the relationship of the parties in these three different industries might be radically different. Similarly in *Application of Berger*, *supra* n. 38, the court determined the scope of a management prerogative clause by citing a decision involving Twentieth Century-Fox Films!

JUDICIAL REVIEW OF LABOR ARBITRATION

to recognize the essential nature of the collective bargaining relationship. For example, in *Carborundum v. Wagner*⁶⁷ the agreement provided for departmental seniority. The Company combined two departments which had somewhat similar processes and then assigned work on one process to men on the other departmental seniority list. The court, apparently unaware of the impact of this on the seniority structure, held that since the Company did this to reduce costs and meet competition this was permitted by the management rights. This interpretation was so indisputable that arbitration would be stayed as there was nothing to arbitrate! The blunders of the court may sometimes be unbearable. Thus in one case the court interpreted a number of interrelated clauses dealing with discharge, layoff and severance pay. The court spelled out the meaning of these clauses in detail and held that the meaning was so clear that arbitration would be stayed. The parties, to salvage the situation, agreed to and signed a letter stating their intended meaning of these provisions which was quite different from that of the court. Unfortunately, even their letter contained an ambiguity on one point and they again ended in court. Undaunted, the judge found these words clear and again stayed arbitration. There is no report of the parties returning for a third round!⁶⁸

In contrast, most arbitrators are reasonably familiar with the practices of the industry in which they arbitrate, understand the special language of the parties, and appreciate the nature of the collective agreement. Many have wide experience in arbitrating, frequently have handled previous cases for the parties, and may be highly skilled specialists in the field. They have an expertness which the courts can seldom match.⁶⁹

The arbitrator has a further advantage over the courts. He is not bound by formal judicial procedures, nor are his hearings restrained by rigid rules of evidence.⁷⁰ In the informal give and take of argument he may see better the broader implications of the narrow problem presented, see more fully the relationship of the parties, fit his decision more closely with their basic intent. The cold formality of a courtroom, the restrictive rules of evidence, and legalistic arguments presented by counsel in terms of "juris-

67. 198 Misc. 2d, 96 N. Y. S. 2d 278 (Sup. Ct., 1950).

68. *Twentieth Century-Fox Film Corp. v. Screen Publicists Guild, Local No. 114*, *supra* n. 38. For a case in which the court apparently failed completely to understand the issue under dispute until corrected on rehearing, see *In re General Electric*, *supra* n. 62.

69. See UPDEGRAFF & MCCOY, *ARBITRATION OF LABOR DISPUTES* (1946) p. 17.

70. See Singer, *Labor Arbitration, Use of Legal Rules of Evidence*, 2 LABOR L. J. 185 (1951).

diction" or "arbitrability" are scarcely adapted to solving disputes arising out of collective agreements.

Most important of all the arbitrator's qualifications is the fact that he is the product of the parties' free choice. The parties by agreeing to arbitration indicate a preference for that method of settling their disputes.⁷¹ They establish it as the administrative process best suited to their needs.

The fact that an arbitrator is an expert aided by a free procedure and vested with power by the consent of the parties does not mean that the courts should exercise no supervisory function. The parties' consent is but a limited one, and they need some assurance of protection from an arbitrator who may run amuck. Furthermore, judicial review has a preventative as well as curative value. Its very presence keeps arbitrators aware that their power is limited and reduces the temptation to play god for the parties. The need is not for judicial abdication, but for judicial restraint. The court should give full recognition to the expertness of the arbitrator and due deference to the choice of the parties, and substitute its judgment for that of the arbitrator only when he was so palpably wrong that to allow his decision to stand would undermine confidence in the arbitration process itself. The test, however, can not be embodied in immutable words, for it is an attitude of tolerance and humility, not a mathematical formula.

The standard of judicial review for labor arbitration should be much the same as the standard used in reviewing the findings of administrative agencies.⁷² The collective agreement is a form of legislation stating the rules that govern the parties' relationship.⁷³ The grievance procedure, ending in arbitration, provides

71. Not only do the parties choose the arbitration process, but in most cases they also choose the arbitrator himself. If they can not agree on an arbitrator, the court may appoint one. C.P.A. § 1453. In *re Fever Transportation Co.*, 295 N. Y. 87, 65 N. E. 2d 178 (1946). However, such cases are extremely rare. The arbitrator is usually selected only after very careful inquiry into his ability and attitudes. Whether the arbitrator is appointed *ad hoc* or is a so-called permanent umpire, he continues to serve only so long as he satisfies the parties. MacDonald, *The Selection and Tenure of Arbitrators in Labor Disputes*, in First Annual Conference on Labor Law (New York University, 1948) p. 145.

72. Although decisions of administrative agencies consist predominantly of findings of fact, and decisions of arbitrators consist predominantly of interpretation of the agreement, both can be subjected to the same broad test: namely, whether the decision has any rational basis. The federal courts have recognized that review of administrative interpretations of statutes may be limited to determining whether there is any reasonable basis. *Gray v. Powell*, 314 U. S. 402 (1941); *N.L.R.B. v. Hearst Publications*, 322 U. S. 111 (1944). However, compare the New York attitude as expressed in *New York Post v. Kelly*, 296 N. Y. 178, 71 N. E. 2d 456 (1947).

73. For a careful analytical study of the legislative character of collective agreements see Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941).

JUDICIAL REVIEW OF LABOR ARBITRATION

the mechanics for administering the law of the parties.⁷⁴ The needs for judicial control and the reasons for judicial restraint are quite similar. The standards are equally impossible to define with precision, but require of the courts the greatest forbearance appropriate to their limited function.⁷⁵

The failure of the courts to recognize their restricted role is most marked when judicial protection is sought by one of the parties prior to arbitration, either by resisting an application to compel or by seeking an order to stay arbitration. Over two-thirds of the cases in which the parties are contesting the merits of the grievance come into court at this pre-arbitration stage. If the court stays arbitration, as it does in more than half of these cases, it completely supplants the arbitrator.⁷⁶ More than that, the court enforces its interpretation of the agreement without even permitting the arbitrator to give it the benefit of his findings and expert opinion which might save it from serious blunders. The court's rationale is that arbitration is futile for there is no doubt possible, but the cases make obvious that what seems clear to the court may become shot through with doubt upon inquiry by one with expertness and understanding. If the outcome is so certain there would be little harm in leaving it in the hands of the arbitrator.⁷⁷ The only possible excuse for staying arbitration is to protect a party from purely frivolous claims brought for purposes of harassment.⁷⁸ In the absence of affirmative showing of bad faith, the court should compel arbitration. If the award is palpably wrong there will still be time for correction.

74. See Carlston, *Theory of the Arbitration Process*, 17 LAW & CONTEMP. PROB. 631, 637 (1952).

75. The difficulty in making such a standard articulate has been described by Justice Frankfurter as the inescapable one arising from using "undefined defining terms." *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474, 489 (1951).

76. Out of nearly 100 reported cases in New York in which the courts have been asked to review the substantive issues of grievances arising under arbitration clauses, 65 have come before the court at the pre-arbitration stage. In 40 of these the court either refused to compel or stayed arbitration.

77. The analogy to administrative law might again prove helpful, for what is involved are the principles which underly the doctrines of primary jurisdiction and exhaustion of administrative remedies. Compare the New York courts frequent stay of arbitration with the Supreme Court's handling of parallel problems in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Petroleum Exploration Inc. v. Public Service Commission*, 304 U. S. 209 (1938); *Macaulay v. Waterman S. S. Corp.*, 327 U. S. 540 (1946). However, the practice of the New York courts in staying arbitration has its echo in *New York Post v. Kelly*, *supra* n. 72.

78. This can be some danger, for arbitration can be costly, and one of the parties with greater resources may use arbitration as a method of financially weakening the other. However, judicial proceedings to stay arbitration are small protection, for they are scarcely less expensive. A more direct remedy would be to permit a civil suit in damages for arbitration proceedings brought in bad faith with the amount of recovery to include the costs of bringing the suit.

The measure of review suggested has thus far been discussed in reference to interpretation of the agreement, for this is the major problem. In some types of grievances the arbitrator is faced with simple questions of fact. Thus in discipline cases there may be a dispute as to whether the offense was committed, and in strike cases there may be a dispute as to whether the union ordered it. In other cases the interpretation question may be intertwined with a dispute as to the facts. However, the courts seldom get involved with these fact questions and have shown no marked inclination to review. This may be a product of judicial restraint, but it may also result from the lack of a record which can be reviewed, and the courts are unwilling to take all of the evidence to retry the issue.

Finally, it is necessary to state more explicitly the role which the courts should play in determining the "jurisdiction" of the arbitrator or the "arbitrability" of the issue. It is generally said that this is a matter for the courts—that to allow an arbitrator to determine his own jurisdiction would be to allow him to pull himself up by his own bootstraps.⁷⁹ If the problem were one of phrase-making we could end there, but the problem is again the practical one of defining the function of the court in supervising the arbitrator. First, the arbitration clause which states the jurisdiction of the arbitrator depends, like any other term in the collective agreement, upon the intent of the parties. Its words are vague, if not nearly meaningless, and the intent lies hidden deep within the history, practices, and unwritten understanding of the parties. All of the reasons placing primary reliance upon the arbitrator to determine intent apply with added force here. All of the reasons for the courts exercising restraint in substituting their interpretation for that of the arbitrator are equally applicable.

Determining the jurisdiction of the arbitrator is no different in kind than any other problem of interpretation, for to find there is no jurisdiction is to determine the substantive rights of the parties. If the union processes a grievance and it is held there is no jurisdiction to arbitrate that must mean either one of two things: either the union has no just claim because management has reserved this freedom and the union is bound by management's action; or both parties have reserved their freedom of action on this point and are free to use their economic strength to obtain their desired ends. Either management has the prerogative or the union is free to strike—but this determines the rights of the par-

79. *Supra* n. 21.

JUDICIAL REVIEW OF LABOR ARBITRATION

ties. The question of jurisdiction should be handled like any other interpretation problem; the results should accord with the intent of the parties. Thus, if the agreement provides for reopening as to wages the question posed is whether the parties intended that management was free to deny increases and the union was prohibited from taking strike action, that the union was free to strike if management denied its demands, or that economic action was barred and that both would be bound by arbitration. To say there is no jurisdiction is only to hold that the parties did not intend the last alternative.⁸⁰ The problem is still one of determining the intent of the parties. This should be left to the arbitrator subject to the limited review of the courts.

Whether courts should be queens and with what firmness they should rule can never be determined by the syllogistic logic of Tweedledee. The question rather is what use can they be in this looking-glass world of labor arbitration. If the courts are to avoid injuring the parties by their awkwardness and to cease causing confusion by their blunders they must recognize their own limitations. They have only vague knowledge of the ways of this world, nor do they understand clearly its language. Furthermore, they have not been chosen by the parties to be queen. The courts have a function, but it is the limited one of exercising only enough supervision to prevent labor arbitration from destroying itself. Even in doing this the courts need to remember that the parties themselves have placed their confidence in the arbitrator and not in the court. The court should at best be a constitutional monarch with very limited powers.

"What do you mean by 'If you really are a Queen'? What right have you to call yourself so? You can't be a Queen, you know, till you've passed the proper examination. And the sooner we begin it, the better."⁸¹

80. The courts, in holding that certain issues are not arbitrable, never indicate which of the two remaining alternatives shall prevail. In many cases the answer is reasonably clear, but in some the parties will be forced to return again to the courts for the final determination of their rights.

81. *Supra* n. 1 at p. 167.